IN THE HIGH COURT OF BOMBAY AT GOA
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WRIT PETITION NO. 206 OF 2004

M/s. Timblo Minerals
Private Limited, a company
incorporated under the
Companies Act, 1956 (Act
1 of 1956), having its
registered office at
Kadar Manzil, P.B.No.34,
Margao, 403 601, Goa. ...Petitioners..

Versus

1. M/s Hardesh Ores Private
Limited, a Company incor-
porated under the Companies
Act, 1956 (Act 1 of 1956),
having its Registered Office
at Vila Flores de Silva,
Erasmo Carvalho Street,
Margao, Goa, 403 601,

2. M/s Sociadade de Fomento
Industrial Private Limited,
a Company incorporated under
the Companies Act, 1956
(Act 1 of 1956) having its
Registered Office at Vila
Flores de Silva, Erasmo
Carvalho Street, Margao,
Goa 403 601,

3. Shri Ramakant Rajaram
Painguinkar, major of age,
r/o Shri Damodar Co-op.
Housing Society Building No.2,
Flat No.1, Aquem, Margao,
403 601, Goa, and

4. M/s. Timblo Private
Limited, a Company incorporated
under the Companies Act, 1956
(Act 1 of 1956), having its
registered office at Kadar
Manzil, P.B. No.34, Margao,
403 601, Goa. ...Respondents.

Shri S. D. Lotlikar, Senior Advocate with Shri M. S. Sonak, advocate for the petitioners.

Shri B. R. Zaiwala, Senior Advocate with Shri E. H. Kotwal and Shri G. R. Mallya, advocate for respondent no.1.

Shri M. S. Usgaokar, Senior Advocate with Shri Sudesh Usgaokar, advocate for respondent no.2.

Shri A.N.S. Nadkarni with Shri N. Takker, advocates for respondent no.3.

Shri D. Pangam, advocate for respondent no.4.

CORAM : S. A. BOBDE, J.

DATE : 17th June, 2004

ORAL JUDGMENT

Rule returnable forthwith. Heard by consent. By this petition, the petitioner/original plaintiffs challenges the refusal of the trial Court i.e. the Civil Judge, Senior Division, Quepem, to recast the issues in Special Civil Suit no. 19/2003/A. Broadly, the case of the plaintiffs is as follows:-

2. According to the plaintiffs they are owners of the land, i.e. a mine, and are entitled to extract the minerals therein. The plaintiffs claim to have acquired these rights under a contract, according to defendant no.3, who appears to support the plaintiffs' case. According to defendant nos.1 and 2, the plaintiffs have forcibly entered the mine in question and it is they who are entitled to exploit the mine win the minerals therefrom under an original Agreement dated 17th December, 1984, wherein rights were granted by defendant no.3 to them.

3. The plaintiffs have come to the Court alleging

that they entered into the land after receiving information from defendant no.3 that the contract between defendant no.3 and defendant nos.1 and 2 has come to an end and that therefore they entered into the contract bona fide with defendant no.3.

4. On 8th April, 2004, the trial Court framed issues as follows:-

1. Whether the plaintiffs prove that the 17.12.1984 agreements entered into by defendant no.3 with defendant no.1 and defendant no.2 were not renewed after 16.12.1993?

2. Whether the plaintiffs prove that after 16.12.1993, defendant no.1 was allowed to extract ore from the suit mine on ad-hoc basis from year to year upto 16.12.2002 and thereafter on month-to-month basis upto 31.5.2003?

3. Whether the plaintiffs prove that after 16.12.1993, ore from the suit mine was sold to defendant no.2 for ad-hoc rates, having no nexus with rates referred to in the original agreement dated 17.12.1984?

4. Whether the plaintiffs prove that the letter dated 5.12.2003 addressed by defendant no.1 and defendant no.2 to defendant no.3 could be replied to only on 25.6.2003 on account of the sickness of the son of defendant no.3?

5. Whether the plaintiffs prove that after receipt of the letters dated 5.12.2003 addressed by defendant no.1 and defendant no.2 to defendant no.3, the defendant no.3 had orally informed defendant no.1 and defendant no.2 that there was no question of renewal of 17.12.1984 agreements?

6. Whether the plaintiffs prove that defendant no.3 did not notice and was not familiar

with the wordings appearing on the payment vouchers dated 27.4.2002, 14.6.2002 and 10.12.2002?

7. Whether the defendant nos.1 and 2 prove that the agreements dated 17.12.1984 were renewed for the 2nd term from 17.12.1993 to 16.12.2002 and for the 3rd term from 17.12.2002 to 16.12.2011?

8. Whether the defendant nos.1 and 2 prove that their working in the suit mine from 17.12.1993 amounts to renewal of the agreements dated 17.12.1984?

9. Whether the defendant no.3 proves that agreements dated 17.12.1984 ceased to remain in force and came to an end upon expiry of nine years i.e. on/or with effect from 16.12.1993 as no option was actually and factually exercised by defendant no.1 and 2 for the renewal of said terms?

10. What relief? What order?"

5. A look at the issues shows that vide issue no.7 the trial Court cast the burden of proving that the original agreements between the defendant no.3 on one hand and the defendant nos.1 and 2 on the other hand, were in existence and have been renewed from time to time on defendant nos.1 and 2. However, contradictorily the trial court has framed issues no.1 and 2 whereby the burden of proving that the agreements dated 17th December, 1984 were entered into by the defendant no.3 with the defendant nos. 1 and 2 and were not renewed after 16th December, 1993, on the plaintiff. Vide issue no.2, the trial Court cast the burden on the plaintiff to prove that after 16th December, 1993, defendant no.1 was allowed to extract ore from the suit mine from year-to-year upto 16th December, 2002.

6. Having regard to the stand of the plaintiffs that they entered into a contract sometime in the year 2003 with the defendant no.3 after having made due enquiries that no one, including the defendant nos.1 and 2 had any rights in the said mines, the plaintiffs applied for recasting of the issues. Inter alia, the plaintiffs sought a recasting of one of the issues as follows:-

> " 3. Whether the plaintiffs prove that the defendant no.3 represented to the plaintiffs that after 16.12.1993, ore from the suit mine was sold to defendant no.2 for ad-hoc rates, having no nexus with rates referred to in the original Agreement dated 17.12.1984?"

The trial court has framed five additional issues and recast issue no.7. The trial Court has, however, declined to recast issue nos. 1 to 6.

7. Having heard the parties at length, I am of the view as a consequence, issue nos.1 to 6 framed by the trial Court on 8th April, 2004, reproduced above, have wrongly cast the burden on the plaintiffs. It is obviously the plaintiffs case that they came on the land, i.e. the mines sometime in the year 2003 and the burden to prove events prior to this could not have been cast on the plaintiffs.

8. Shri Zaiwalla, learned Senior Counsel for the respondent no.1, contended that the framing of issues does not, ipso facto, cast the burden to prove the same on the

party specified in the issue, as having that burden. The learned counsel relied on a decision of a Division Bench of this Court in the case of **Totaram Maharu vs. Ramabai & Ors.,** reported in AIR 1976 Bom.315, where this Court has observed as under:-

> "In my opinion, the question of onus should not enter into the framing of issues at all, but should be dealt with by the court when taking up the issues for consideration. The form in which an issue is framed should not be determinative of question of onus."

With respect, there is no doubt that the question of onus is not determined by the form in which an issue is framed. that is, however, in my opinion different from the burden to prove because indeed the burden of proving a fact is cast on a particular party, depending on the way in which the issue is framed. It is well-settled that while the burden to prove is static and cast on the basis of the averments of the parties, the onus is dynamic and depends on the extent to which the burden is discharged during the course of the trial.

9. However, Mr. Zaiwalla contended, and in my view rightly, that the plaintiffs must prove that they made due enquiries from defendant no.3 and from other persons and bona fide entered into the contract without notice of the defendant nos. 1 and 2. Hence, accordingly, in my view, that issue should be framed to the following effect:-

"Whether the plaintiffs diligently believed that no other person had any rights in the mine and, therefore, bona fide entered into a contract with the defendant no.3 without notice of the rights of the defendant nos.1 and 2 in respect of the mine?"

10. In the result, I am of the view that issues nos.1 to 6 framed on 8th April, 2004, shall be deleted and substituted by the following:-

1. Whether the plaintiffs prove that the defendant no.3 represented to the plaintiffs that after 16.12.1993, ore from the suit mine was sold to defendant no.2 for ad-hoc rates, having no nexus with rates referred to in the original Agreement dated 17.12.1984?

2. Whether the plaintiffs prove that they were informed by the defendant no.3 about the letter dated 5.12.2003 addressed by the defendant no.1 and defendant no.2 to defendant no.3 could be replied to only on 25.6.2003 on account of the sickness of the son of defendant no.3?

3. Whether the plaintiffs prove that they were told by defendant no.3 that after the receipt of the letters dated 5.12.2003 addressed by the defendant no.1 and defendant no.2 to defendant no.3, the defendant no.3 had orally informed defendant no.1 and defendant no.2 that there was no question of renewal of the 17.12.1984 Agreements?

4. Whether the plaintiffs prove that the defendant no.3 told the plaintiffs that the defendant no.3 did not notice and was not familiar with the wordings appearing on the payment vouchers dated 27.4.2002, 14.6.2002 and 10.12.2002?"

As observed earlier, an issue framed at the instance of the

learned counsel for the defendant nos.1 and 2 shall also be framed.

11. Rule nisi made absolute in the above terms. I am informed that the matter is fixed before the trial Court on 21st June, 2004. The trial court may grant sometime to the plaintiff to tender their affidavit on evidence. Petition disposed of accordingly.

S. A. BOBDE, J.

mc.